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No. 01-400

In The

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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59 pp

CAPITAL CASE
QUESTIONS PRESENTED

I.

Did the court of appeals exceed its authority under 28 U.S.C. §2254(d)(1), as interpreted by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000), by granting habeas relief to respondent on his claim of ineffective assistance of counsel at the sentencing phase of his capital trial, where that claim had been previously adjudicated and rejected on the merits in Tennessee state court proceedings?

II.

May a court of appeals bypass the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and presume prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), to find a violation of the Sixth Amendment right to counsel, where defense counsel conducts a thorough pre-trial investigation, presents lay and expert witness testimony in support of a mental health defense at trial, conducts direct and cross-examination, and addresses the jury at both the guilt and sentencing phases on behalf of his client, and where state and district courts have previously determined that the defendant failed to demonstrate actual prejudice from any deficiencies identified in the attorney's performance?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1) is reported at 243 F.3d 961. The memorandum opinion of the United States District Court for the Western District of Tennessee relevant to respondent's ineffective assistance of counsel claim (Pet. App. 39) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on March 22, 2001. (Pet. App. 1-38) A petition for rehearing was denied on June 1, 2001. (Pet. App. 112) The petition for a writ of certiorari was filed on August 30, 2001, and granted on December 10, 2001. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. §2254(d) provides in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

In 1982, Gary Bradford Cone was convicted of two counts of first degree murder by a Shelby County, Tennessee, jury. Following a separate sentencing hearing, the jury sentenced Cone to death for each of the two murders. Cone's convictions and sentences were affirmed on direct appeal (Pet. App. 84), and later upheld in state post-conviction proceedings. (Pet. App. 101) Cone then sought a writ of habeas corpus in federal district court. The district court summarily denied relief, concluding that Cone failed to demonstrate prejudice from counsel's alleged deficiencies and, further, that he failed to demonstrate that the state court's adjudication of his ineffective assistance claim "involved an unreasonable application of clearly established Federal law" under §2254(d)(1). (Pet. App. 77-83)

On appeal, nineteen years after Cone's criminal trial and sentencing, the court of appeals reversed his death sentences, finding that defense counsel's decision to present no mitigation evidence at the sentencing phase and to waive closing argument at sentencing not only amounted to constitutionally deficient performance, but was so deficient as to raise a presumption of prejudice, resulting in a violation of Cone's Sixth Amendment right to counsel. (Pet. App. 37) The court of appeals based its decision on the same testimony presented to the State courts and upon which those courts relied in rejecting the same claims in state post-conviction proceedings. (Pet. App. 34)

1. The brutal murders of Shipley and Cleopatra Todd were the climax of a series of criminal episodes that

began on August 9, 1980, when Cone robbed a jewelry store in Memphis of approximately $112,000 in merchandise. (Pet. App. 85) The jewelry store manager gave a description of the suspect to police, and an officer in an unmarked police car spotted Cone driving his vehicle a short time after the robbery and pulled in behind him. (*Id.*) Cone apparently became alarmed and accelerated in an attempt to escape. A high-speed chase ensued through mid-town Memphis and into a residential neighborhood, where Cone abandoned his automobile and proceeded on foot. (*Id.*) As he fled from police, Cone shot one of the police officers who attempted to arrest him, shot a citizen who challenged him, pulled a gun on a third person and demanded that the latter give Cone his automobile. When the owner of the automobile fled, Cone snapped his pistol several times, but the ammunition in the weapon had been exhausted. (*Id.*)

Cone managed to elude police on August 9th but appeared at the door of a home in the same neighborhood early the next morning and asked to use the phone. When the elderly resident, Lucille Tuech, refused him admittance, Cone drew his pistol and pointed it at her. Ms. Tuech quickly slammed the door, ran to another part of the house, and called the police. (*Id.*; R. 4, Add. 1, Vol. XII, pp. 1207-08) Later that same afternoon, Cone broke into the home of Shipley and Cleopatra Todd, who lived a short distance from Ms. Tuech. Mr. Todd was 93 years of age; his wife was 79. The couple's bodies were found three days later after authorities were alerted by anxious relatives. Both victims had been beaten to death. (Pet. App. 86) Mr. Todd sustained 16 blows, mostly to the back of the head, and Mrs. Todd sustained 22 blows to the

back and left side of the head; defensive wounds were present on the hands of both. The cause of death to both victims was multiple blunt trauma to the head inflicted by an instrument consistent with a gun. (R. 4, Add. 1, Vol. XIII, pp. 1293, 1295-96, 1298-1300) Cone's fingerprints and hair samples were found in the Todds' home, which had been ransacked, and he was apparently able to steal enough money from their home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12. (Pet. App. 86)

At trial, Cone did not dispute killing the Todds but claimed that he was insane at the time of the crimes or lacked the requisite mental capacity to commit the offenses. Cone presented the testimony of two expert witnesses to support his defense. Matthew Jaremko, a clinical psychologist, opined that Cone suffered from two interrelated disorders: a substance-abuse disorder and post-traumatic stress disorder. The substance-abuse disorder was caused primarily by post-traumatic stress disorder, which arose from Cone's exposure to combat trauma in Vietnam and his continuing trauma after returning home as a veteran of an unpopular war. (J.A. 12) According to Jaremko, Cone's post-traumatic stress disorder manifested itself over the years in the form of flashbacks, nightmares, depression, nervousness, and sleep disorders. (J.A. 12-13) Dr. Jaremko testified that, in his opinion, Cone was suffering from a mental illness in August 1980, which rendered him incapable of conforming his conduct to the requirements of the law. He further testified that Cone expressed remorse for what happened. (J.A. 14)

Jonathan Lipman, a neuropharmacologist, testified that he examined Cone and detailed his history of drug abuse. Dr. Lipman testified that Cone had no history of drug abuse until the age of 18, when he was first exposed to hashish while serving in the Army in Germany. Cone was later introduced to opium and amphetamines while serving in Vietnam, where he was reportedly issued amphetamines for 53 consecutive nights to maintain alertness while on guard duty. (J.A. 18) According to Dr. Lipman, that pattern of amphetamine use continued throughout the rest of Cone's history. Dr. Lipman opined that, in August 1980, Cone was suffering from chronic amphetamine psychosis, which prevented him from knowing the wrongfulness of his acts and rendered him substantially incapable of conforming his conduct to the requirements of the law. (J.A. 18-19)

In addition to expert testimony, Cone's mother, Valeree Cone, testified that she had noticed a change in her son after his return from Vietnam. She testified that Cone acted like he was "in another world" and slept very badly. He spoke to her about handling bodies while he was in Vietnam and the condition the bodies were in. (J.A. 9-10) She further testified that Cone did not laugh or cry, but seemed to be "just holding it in." (J.A. 10) In rebuttal, the State offered two mental health experts, neither of whom found any basis for an insanity defense. (Pet. App. 90-91)

The jury rejected Cone's insanity defense, convicting him at the conclusion of the guilt phase of two counts of first degree murder, three counts of assault with intent to commit first degree murder, and robbery by use of a deadly weapon. (Pet. App. 84) At sentencing, the State

relied on four aggravating circumstances to support imposition of the death penalty: (1) that Cone was previously convicted of one or more felonies, other than the present charge, involving the use or threat of violence to the person; (2) that Cone knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder; (3) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (4) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. Tenn. Code Ann. §§39-2-203(i)(2), (3), (5), and (6) (1982). (J.A. 22-23, 50-52)

Through the testimony of a court clerk and a fingerprint examiner, the State established that Cone had three prior convictions for robbery with a firearm. (J.A. 28-29, 34-35) In addition, the State recalled at sentencing two Memphis police officers who had been involved in the initial efforts to apprehend Cone after the jewelry store robbery. Both officers testified that Cone evaded arrest. (J.A. 36-40)

Although defense counsel presented no direct evidence in mitigation, in an opening statement at sentencing, Cone's counsel explained to the jury that the defense would rely upon mitigating evidence presented during the guilt phase of trial:

> I believe his Honor will tell you that [sic] was presented in the main portion of this case can be considered by you in considering both aggravating and mitigating circumstances. . . . The Defense has put on proof of those mitigating

> circumstances during its case, and I would like to review those with you. . . .

(J.A. 24)[1] Counsel then reiterated certain aspects of the guilt-phase evidence, particularly the testimony of Drs. Lipman and Jaremko, arguing that the proof supported application of three specific statutory mitigating circumstances. (J.A. 24-25) Counsel further argued in support of non-statutory mitigating factors, emphasizing, as he had done throughout the trial, Cone's military service:

> I suggest to you that Dr. Jaremko stated, in his interview with my client, my client has expressed remorse for his conduct. That is not a statutory mitigating circumstance, but it is a circumstance that you can consider, as the General says, under the rule. And I asked all of you, each and every one of you, to look at the whole man in this case, when we began. And I suggest to you that proof has been put in this record that he is an honorably discharged veteran of his country, and I ask you to look at that in light that there is no evidence of any kind, of any nature, in this record, other than the fact that his drug abuse began under the stress and strain of combat service. And I suggest to you that that is a mitigating circumstance.

(J.A. 25-26)

Finally, trial counsel asked the jury for mercy on behalf of his client:

> [T]here is good reason for maintaining life if you look at the whole man in this particular case. . . .

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[1] The jury was so instructed by the trial court at the conclusion of the sentencing phase. (J.A. 53)

> [O]ur ethics have been questioned, the defense team. If we're unethical to seek mercy, then I am unethical. But mercy is – it's a double blessing. It's a blessing to the person who gives, and it's a blessing to the person who receives. And I would say to you that mercy – if you consider life under the mitigating circumstances, and the aggravating circumstances in this case – raises you above the State, raises you above the King, if you will. It raises you to the level of God.

(J.A. 26)

On cross-examination of a State's witness in the sentencing phase, defense counsel elicited information showing that Cone was awarded a Bronze Star for his military service in Germany and Vietnam and was honorably discharged from the United States Army in July 1969. (J.A. 31) Counsel successfully prevented the State from introducing gruesome photographs depicting the condition of the victims' bodies on the day they were discovered. (J.A. 41-49) The trial court also sustained other objections posed by defense counsel throughout the course of the sentencing phase. (J.A. 37, 38)

The jury returned verdicts of death for each of the two murders, finding that the State had proven all four aggravating circumstances beyond a reasonable doubt and that there were no mitigating circumstances sufficiently substantial to outweigh those aggravating circumstances. (R. 4, Add. 1, Vol. XX, pp. 2223, 2225) The Tennessee Supreme Court affirmed Cone's convictions

and sentences on direct appeal[2] (Pet. App. 84), and this Court denied certiorari. *Cone v. Tennessee*, 467 U.S. 1210 (1984).

2. Cone initiated state post-conviction proceedings in June 1984, alleging, among other things, that trial counsel was ineffective at the penalty phase of trial in failing to present proof of mitigating circumstances and in waiving final argument. (R. 4, Add. 2, Vol. I, p. 51) The trial court conducted an evidentiary hearing on Cone's claims. Among the witnesses presented by Cone were two attorneys licensed in Tennessee, who offered their opinions regarding the wisdom of waiving closing argument in a capital sentencing hearing and of relying upon guilt-phase proof for mitigation. (R. 4, Add. 2, Vol. II, pp. 69-82, 180-89) Cone also presented the testimony of his mother, who testified that she would have pled for her son's life in the penalty phase if asked. (R. 4, Add. 2, Vol. III, pp. 192-94)

Cone's trial counsel, John Dice, testified that he investigated Cone's background (J.A. 61-62) and chose not to put on additional character witnesses at sentencing to prevent the prosecution from bringing out negative information on cross-examination. (R. 4, Add. 2, Vol. II, pp. 104-05, 136-38) Counsel did not think that Cone's

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[2] The Tennessee Supreme Court found that the aggravating circumstance under Tenn. Code Ann. §39-2-203(i)(3) (1982) (risk of death to two or more persons) was inapplicable to an extended criminal episode, such as the one here. But because the jury clearly found three other aggravators, the Court found that any error with respect to the (i)(3) circumstance was harmless beyond a reasonable doubt. *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984). (Pet. App. 98-99)

mother had been a good witness at the guilt phase and chose, for tactical reasons, not to recall her at sentencing. (J.A. 63) Although Cone's sister initially agreed to testify for Cone, she ultimately changed her mind, and counsel testified that there was disagreement among family members about aspects of Cone's "family dynamics." (R. 4, Add. 2, Vol. II, p. 135; Vol. III, pp. 157-58)

The criminal court entered findings of fact and conclusions of law denying post-conviction relief. (J.A. 78) Specifically, the criminal court found that trial counsel had put a great deal of thought and preparation into the case and had interviewed numerous family members and relatives, whose testimony was contradictory and generally not helpful. The trial court credited trial counsel's testimony that his strategy was to introduce as much mitigation as he could during the guilt phase of trial. (J.A. 83-84) As to the waiver of final argument, the trial court concluded that it was a strategic decision in view of the prosecutor's reputation for devastating closing arguments. (J.A. 84) In its written order denying post-conviction relief, the criminal court identified *Strickland v. Washington*, 466 U.S. 668 (1984), and *Darden v. Wainwright*, 477 U.S. 168 (1986), as the controlling legal authority on Cone's claim of ineffective assistance. (J.A. 84)

Citing *Strickland, supra*, the Tennessee Court of Criminal Appeals affirmed the decision of the trial court, likewise rejecting Cone's contentions that trial counsel was ineffective at the penalty phase of trial. As to the presentation of mitigating evidence, the court found that Cone had demonstrated neither deficient performance nor prejudice:

> The appellant [Cone] stated that two medical experts who testified for the defense at the guilt phase of the trial should have been reintroduced to testify at the penalty phase as to the appellant's mental state at the time the crimes were committed. He also contends that his mother should have been reintroduced to testify concerning his early childhood.
>
> The trial court accredited the testimony of the defense attorney during which he explained that this evidence had been presented during the guilt stage of the proceeding. Trial counsel was aware that the trial judge would instruct the jury that it could consider mitigating circumstances proved at the guilt stage of the trial. Defense counsel also testified that the appellant's mother did not make a good witness at the guilt stage of the trial and in his judgment, the best tactic was to not subject her to further cross examination.
>
> The appellant complains because defense counsel did not introduce other relatives and associates to testify concerning his early childhood. Defense counsel testified that these potential witnesses were interviewed by him and that he concluded that there was a danger that cross examination would elicit additional criminal activity on the part of the appellant. There is nothing in the record to show that the testimony of these witnesses would have benefited the defense. In the absence of this showing, we will not presume that trial counsel erred in not calling them as witnesses.

(Pet. App. 108-09)

Regarding counsel's waiver of closing argument, the court stated:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance. . . .
>
> The question of what witnesses to use and whether to waive final argument are tactical questions upon which competent lawyers might disagree. It cannot be said that incompetent representation had occurred merely because other lawyers, judging from hindsight, might have made a better or different choice of tactics.

(Pet. App. 110)

Finally, assessing counsel's overall performance, the Tennessee appellate court found:

> Trial counsel made a diligent and thorough investigation of the facts and the law. Although the appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of the appellant's defense. Trial counsel was very conscientious in representing the appellant and placed much thought and effort into the tactical aspects of this case. However, trial counsel's work and diligence could not remove the overwhelming evidence against the appellant, both on the factual issue and insanity issue. In our view, the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel.

(Pet. App. 111)

3. Cone sought federal habeas relief in July 1997, asserting numerous grounds, including ineffective assistance based on counsel's failure to introduce mitigating evidence and waiver of closing argument at sentencing. (R. 71, pp. 21-22) The district court summarily dismissed Cone's ineffective assistance of counsel claim, finding in pertinent part that Cone failed to demonstrate any prejudice from the failure of his trial counsel to introduce mitigating evidence at sentencing. (Pet. App. 78-80) The district court further found that Cone failed to meet §2254(d)(1)'s threshold requirement that a habeas petitioner demonstrate the state court's rejection of his Sixth Amendment claim "involved an unreasonable application of clearly established Federal law." (Pet. App. 80)

As to counsel's waiver of closing argument at sentencing, the district court found that Cone failed to offer any basis to dispute the state court's determination that the decision was a tactical choice to foreclose rebuttal argument by the prosecution and, further, that the state appellate court's decision on the issue was "a reasonable application of Sixth Amendment standards to the facts presented in the state post-conviction proceedings." (Pet. App. 80-81) The district court denied relief on all remaining claims and dismissed Cone's petition entirely on January 29, 1999. (R. 170)

The court of appeals reversed and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences due to ineffective assistance of counsel at sentencing. Contrary to the findings of both the Tennessee state courts and the district court, the court of appeals concluded that counsel's decision not to present evidence at sentencing and to make no final argument amounted to constitutional ineffectiveness. (Pet. App. 37) As to the failure to present evidence at the sentencing stage, the court of appeals merely stated, "[C]ounsel had plenty of mitigating evidence at his fingertips; yet he failed to present it at the sentencing phase." (Pet. App. 35) Further, the court of appeals rejected the Tennessee courts' conclusion that counsel's decision to waive final argument was a legitimate tactical decision, concluding instead that the explanation given by Cone's counsel for waiving closing argument was "totally unreasonable," and stating:

> We reject out of hand, the argument that a competent attorney would determine that not presenting mitigating evidence of any kind and not making a final argument in a death penalty case is a justifiable "strategy" because doing so might trigger a "devastating" response by the prosecutor – the sole reason assigned by the Tennessee courts for excusing counsel's silence. How much worse off could Cone have been if he were sentenced to death after a "devastating" argument by the prosecutor than if he were sentenced to death after the prosecutor's "mild" request that he be sentenced to death, which was followed by his own attorney's silence? Or, asked differently: How much more devastating for the petitioner could the prosecutor's "devastating" argument have been than the death sentence the petitioner got without such argument?

(Pet. App. 35-36)

The court of appeals then determined that Cone need not show actual prejudice under the second prong of *Strickland*, because a presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), was raised by counsel's behavior. (Pet. App. 37) The court reasoned that the prosecutor's insistence at the sentencing phase that Cone be put to death had not been subjected to "meaningful adversarial testing" and that counsel had "abandoned" Cone at a critical stage of his trial. (Pet. App. 37)

SUMMARY OF THE ARGUMENT

1. As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2254(d), in pertinent part, prohibits a federal habeas court from granting relief on a claim adjudicated on the merits in state court proceedings unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. §2254(d)(1). Simply put, AEDPA removed the authority of a federal court to disturb a state court judgment based upon its independent determination that the state court erred in deciding a constitutional question. As this Court explained in *Williams v. Taylor*, 529 U.S. 362, 410 (2000), the most important distinction between review under the present §2254(d) and pre-AEDPA

review is that "an *unreasonable* application of federal law [by a state court] is different from an *incorrect* application of federal law." A state court decision that is merely incorrect, but not unreasonable, may no longer be disturbed on habeas review.

Nevertheless, en route to vacating Cone's death sentences imposed over 19 years ago by a Tennessee jury, the court of appeals began its analysis with the clearly erroneous assertion that its review of Cone's ineffective assistance of counsel claim should be *de novo*. (Pet. App. 30-31) Although the Tennessee courts had previously determined that Cone's trial counsel made reasoned tactical decisions regarding the presentation of mitigation evidence and waiver of closing argument at sentencing, and that neither alleged attorney error had prejudiced the defense, the court of appeals rejected those conclusions "out of hand," and, without any analysis of how counsel's alleged deficiencies could have affected the outcome, presumed prejudice. While the court of appeals paid lip service to AEDPA by quoting the pertinent provision in the final paragraph of its opinion, compliance with §2254(d) requires more than mere talismanic recitation of its language. The court of appeals' actual analysis of Cone's ineffective assistance claim, indistinguishable from that employed in pre-AEDPA cases, belies its asserted application of §2254(d).

The Tennessee courts, in assessing Cone's claims, fully comprehended and reasonably applied the *Strickland* standard for judging the performance of counsel under the Sixth Amendment, heeding this Court's instruction that "[j]udicial scrutiny of counsel's performance must be highly deferential" and recognizing the

Sixth Amendment's strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Thus, because the decision of the Tennessee courts was neither contrary to nor an unreasonable application of *Strickland*, federal habeas relief was barred by §2254(d).

2. Compounding its error under §2254(d), the court of appeals applied a presumption of prejudice to find a Sixth Amendment violation under the auspices of *United States v. Cronic*, 466 U.S. 648 (1984), ignoring the finding of the Tennessee appellate court that Cone's convictions and sentences were the result of "overwhelming evidence" against him, and not "shortcomings of counsel." But this Court has recognized only three narrow exceptions in which prejudice may be presumed to find a violation of the Sixth Amendment right to counsel: (1) where counsel is denied altogether; (2) where the state interfered with counsel's representation; and (3) where counsel is burdened with an actual conflict of interest that affects his or her performance. Aside from those circumstances, however, where a claim of ineffective assistance of counsel rests upon some articulable error by counsel in the course of representation, and where the "surrounding circumstances" do not prevent counsel's effective functioning, a defendant must affirmatively demonstrate both deficient performance and prejudice as a result of attorney error. Cone's ineffective assistance claim in this case was premised upon specific allegations of attorney error – the failure to present mitigation evidence and waiver of closing argument at sentencing. Cone was not without counsel during the sentencing

phase, nor was his lawyer precluded from rendering effective assistance by some structural impediment. To the contrary, Cone's lawyer conducted a thorough pretrial investigation, presented lay and expert witnesses in support of a mental health defense at trial, cross-examined the State's witnesses, and addressed the jury on his client's behalf at both the guilt and sentencing phases of trial. The quality and effect of the lawyering afforded Cone was fully capable of assessment under *Strickland*, and the Sixth Circuit erred in relieving Cone of his burden of proving both components of that standard.

ARGUMENT

I. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY GRANTING HABEAS RELIEF ON RESPONDENT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE THE SAME CLAIM HAD BEEN PREVIOUSLY REJECTED ON THE MERITS IN STATE COURT PROCEEDINGS.

In 1996, Congress curtailed the power of federal courts to grant habeas relief to state prisoners through passage of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1219 (1996) ("AEDPA"). Under pre-AEDPA habeas law, federal courts reviewed "mixed" constitutional questions (*i.e.*, those involving application of constitutional law to facts) *de novo* with a presumption of correctness as to factual findings by the state courts. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Townsend v. Sain*, 372 U.S. 293 (1963) (using the terms "independent," "*de novo*," and "plenary" to

describe pre-AEDPA habeas review of state court findings). By enacting §2254(d)'s general rule of prohibition, Congress abolished *de novo* review of mixed questions of law and fact that have been previously adjudicated on the merits in state court proceedings. No longer may a federal court issue the writ based upon its independent judgment that the state court decision was incorrect. Rather, as this Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), a federal court's inquiry on such claims is limited to the *reasonableness* of the state court's application of clearly established federal law. *Id.*, 529 U.S. at 412.

In this case, filed after enactment of AEDPA and therefore subject to its provisions, *Lindh v. Murphy*, 521 U.S. 320, 336 (1997), the court of appeals' analysis, while purporting to comply with the mandates of 28 U.S.C. §2254(d)(1) (Pet. App. 37), began with the clearly erroneous assertion that its review of Cone's ineffective assistance of counsel claim would be *de novo*. (Pet. App. 30-31) The court then compounded its error by conducting an independent re-assessment of defense counsel's testimony during the state post-conviction proceedings and by rejecting outright the findings of the state courts with respect to that testimony. (Pet. App. 35-36) In concluding that Cone was denied effective assistance of counsel at sentencing, the court of appeals completely disregarded the prior adjudication of the Tennessee state courts and, essentially, substituted its judgment instead. In so doing, the federal court exceeded its statutory authority to grant the writ and directly contravened this Court's decision in *Williams v. Taylor, supra*.

A. Scope of Review under §2254(d)(1)

The relevant provision of AEDPA, 28 U.S.C. §2254(d)(1), prohibits a federal court from granting habeas relief to a state prisoner with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In *Williams*, this Court resolved a conflict among the circuits regarding the proper interpretation of that provision.

First, the Court instructed that the "contrary to" and "unreasonable application" clauses of §2254(d)(1) have independent meaning. *Id.*, at 404. The Court explained that a state court decision will be "contrary to" its clearly established precedent if the state court either "applies a rule that contradicts the governing law set forth in our cases," *id.*, at 405, or if the state court "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.*, at 406.

Second, the Court explained that a state court decision involves an "unreasonable application" of this Court's precedent if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.*, at 407-08. In making that inquiry, a federal court must assess whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.*, at 409. Observing that Congress specifically used the term "unreasonable," as opposed to terms like "erroneous" or

"incorrect," the Court further instructed that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*, at 411.

Finally, the Court interpreted the language "clearly established Federal law, as determined by the Supreme Court of the United States." That statutory phrase refers to "holdings as opposed to dicta" of this Court's decisions as of the time of the state court decision. *Id.*, at 412.

Thus, under *Williams*, a federal court's review of a state court's decision under §2254(d)(1) involves a two-part inquiry: first, whether the state court correctly identified the governing legal rule; and second, whether the state court applied that rule in an objectively reasonable way to the facts of the prisoner's case. When that standard is applied to the Tennessee courts' rejection of Cone's ineffective assistance claim, it cannot be said that the state court's decision contravened controlling case law or involved an unreasonable application of that case law.

B. The Tennessee state courts correctly identified the governing legal rule.

The threshold question under §2254(d) is whether the state court correctly identified the governing legal rule. As this Court noted in *Williams*, the merits of a claim of ineffective assistance are "squarely governed" by the holding in *Strickland*. Moreover, "[i]t is past question that

the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.' " *Williams*, 529 U.S. at 390-91. Thus, a state court decision that fails to apply *Strickland* to an ineffective assistance of counsel claim would be "contrary to" clearly established precedent of this Court and an exception to §2254(d)'s general rule of prohibition.[3]

The *Strickland* rule for evaluating Sixth Amendment claims of ineffective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

Strickland, 466 U.S. at 687.

To establish a claim of ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 687-88. This Court instructed that the reasonableness of

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[3] In *Williams*, for example, this Court held that the Virginia Supreme Court's determination that *Lockhart v. Fretwell*, 506 U.S. 364 (1993), modified or supplanted *Strickland* (requiring a separate inquiry into fundamental fairness, even when the defendant is able to show both deficient performance and prejudice) was "contrary to" established federal law. *Williams*, 529 U.S. at 393-95.

counsel's challenged conduct must be judged on the facts of the particular case, "viewed as of the time of counsel's conduct." *Id.*, at 690. Judicial scrutiny of counsel's performance must be "highly deferential," and a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," bearing in mind that "[t]here are countless ways to provide effective assistance in any given case." *Id.*, at 689-90. A defendant challenging counsel's performance "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*, at 689. To establish prejudice under *Strickland*, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694.

In the state post-conviction proceedings at issue here, the trial court correctly identified *Strickland* and *Darden v. Wainwright*, 477 U.S. 168 (1984), as the controlling legal authority. (J.A. 84) Finding that counsel's performance "did not fall below the objective standard of reasonableness" required under the Sixth Amendment, *Strickland*, 466 U.S. at 687-88, the court denied relief. (J.A. 84) On appeal, the Tennessee Court of Criminal Appeals likewise identified *Strickland* as controlling precedent (Pet. App. 107) and affirmed the trial court's determination that counsel was not ineffective. In addition, the state appellate court found that Cone failed to establish prejudice from counsel's alleged deficiencies: "In our view, the findings of guilt and the imposition of the death penalty

were based upon the facts and the law – not by shortcomings of counsel." (Pet. App. 111)

The Sixth Circuit's decision simply to presume prejudice, citing *United States v. Cronic*, 466 U.S. 648 (1984), is directly contrary to *Strickland*, which held that to establish a claim of "actual ineffectiveness" of counsel at trial, a defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 683, 694. While it is true that *Strickland* recognized that there are a few narrow situations in which prejudice may be presumed, *id.*, at 692, this case, in which Cone challenges deficiencies in counsel's actual performance at trial, is not one of them. *See* Argument II, *infra* pp. 39-41.

> Conflict of interest claims aside, *actual ineffectiveness claims* alleging a deficiency in attorney performance are subject to a general requirement that the defendant *affirmatively prove prejudice*. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. . . . Even if a defendant shows that particular errors of counsel were unreasonable, therefore, *the defendant must show that they actually had an adverse effect on the defense.*

Strickland, 466 U.S. at 693 (emphasis added).

Nor could it be said that the state courts unreasonably failed to extend the principle of "presumed prejudice" under *Cronic* to the facts of this case. This Court has made

clear that, "in cases involving mere 'attorney error,' we require the defendant to demonstrate that the errors 'actually had an adverse effect on the defense.' " *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (quoting *Strickland*, 466 U.S. at 693). Further, as noted in *Williams*, "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams*, 529 U.S. at 391. Cone's ineffective assistance claim was premised upon specific allegations of attorney error. Thus, both the trial and appellate courts in the state post-conviction proceedings analyzed Cone's ineffective assistance claim under the correct legal standard; the Sixth Circuit did not.

C. The Tennessee state courts' application of *Strickland* to the facts of Cone's case was objectively reasonable.

Having correctly identified the governing law (in this case *Strickland*), a state court's application of that standard to the facts of a prisoner's case may be disturbed on habeas review only if "unreasonable" under §2254(d)(1). Although this Court acknowledged in *Williams* that the standard is difficult to define, it did provide guidance. First, the Court specifically rejected the subjective standard of review set out in *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), in favor of a standard of objective reasonableness. Second, the Court emphasized that the "most important point" of the analysis is the critical distinction between an "unreasonable" application of federal law and an "incorrect" or "erroneous" application of federal law. *Williams*, 529 U.S. at 410, 412.

Since *Williams*, the circuits have divided over whether a federal court must first determine that the state court's decision was erroneous before considering whether the decision, if erroneous, involved an unreasonable application of federal law. In *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir.), *cert. denied*, 531 U.S. 944 (2000), the court looked to the doctrine of "clear error" to determine what constitutes an "unreasonable application" of federal law, holding that when an independent review of the legal question by a federal court leaves the court with the "firm conviction" that clear error has occurred, the state court's decision must be reversed as an "unreasonable application" of clearly established federal law. *Van Tran*, 212 F.3d at 1153-54. "Requiring federal courts to first determine whether the state court's decision was erroneous, prior to considering whether it was contrary to or involved an unreasonable application of controlling law," the court reasoned, "promotes clarity in our own constitutional jurisprudence and also provides guidance for the state courts, which can look to our decisions for their persuasive value." *Id.*, at 1155.

But, as the Fourth Circuit observed in *Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000) (*en banc*), *cert. denied*, 70 U.S.L.W. 3235 (2001), because a federal court may grant habeas relief only if the state court decision is contrary to, or an unreasonable application of, Supreme Court precedent, "any independent opinions we offer on the merits of the constitutional claims will have no determinative effect on the case before us, nor any precedential effect for state courts in future cases," constituting "at best . . . a body of constitutional *dicta*." *Jarvis*, 236 F.3d at 162. Nor are the state courts – as co-equal interpreters of the

federal Constitution and this Court's case law – in need of "guidance" by federal circuit courts in interpreting and applying this Court's precedent. *Id. Van Tran's* "clearly erroneous" standard would render meaningless Congress' use of the term "unreasonable" in §2254(d)(1), a result this Court sought to avoid in *Williams* by making a clear distinction between an "incorrect or erroneous application" of federal law and an "unreasonable application" of federal law. *Williams*, 529 U.S. at 410. The focus of a federal court's inquiry under §2254(d)(1) is not whether the federal court would find a constitutional violation if presented with a factual scenario identical to that in the state court, but the reasonableness of the state court's decision in light of the evidence before it. If reasonable minds could disagree as to the outcome, the state court's decision is not an unreasonable application of controlling federal law. *Williams*, 529 U.S. at 410 ("reasonable jurists" standard in the *Teague* context is an objective inquiry). *See* Brief of Amicus CJLF.

1. Failure to Present Mitigating Evidence at Sentencing

In state post-conviction proceedings, Cone challenged trial counsel's failure to present mitigating evidence at the penalty phase. (J.A. 82) At a hearing in state court, Cone's mother testified that she would have pled for her son's life at sentencing if asked. (J.A. 69) She also named specific family members and acquaintances who knew Cone well. According to Mrs. Cone, counsel asked "quite a few questions" about those individuals early in the case, but "later he discontinued asking." (J.A. 70-71,

74-77) Cone's trial counsel testified that he investigated Cone's background and chose not to put on additional character witnesses at sentencing to prevent the prosecution from bringing out negative background information on cross-examination. (R. 4, Add. 2, Vol. II, pp. 93, 104-05, 136-38) He stated that, although Cone's sister had initially committed to testify for Cone, she eventually changed her mind. He further indicated that there was disagreement among family members about aspects of Cone's "family dynamics." (R. 4, Add. 2, Vol. II, pp. 135-36; Vol. III, pp. 157-58)

The post-conviction judge found that trial counsel "put a great deal of thought and preparation in this case" and had "interviewed numerous family members and relatives." (J.A. 84) The court credited counsel's testimony that "his strategy was to get as much evidence in during the guilt/innocence phase as he could" and, citing this Court's decisions in *Strickland* and *Darden*, concluded that counsel's performance "did not fall below the objective standard of reasonableness" required by the Sixth Amendment. (J.A. 84) Likewise, on appeal, the Tennessee Court of Criminal Appeals found that counsel made a series of reasoned tactical decisions regarding presentation of mitigation proof at the sentencing phase of trial. (Pet. App. 108-10) The court credited counsel's testimony that he determined not to present additional evidence during sentencing because it had already been presented during the guilt phase and further found that counsel's decision not to recall Cone's mother at sentencing was a tactical decision to prevent harmful cross-examination. (Pet. App. 108-09)

This Court has stated that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," and "judicial scrutiny of counsel's performance must be highly deferential. . . . " *Strickland*, 466 U.S. at 689-90. In *Darden v. Wainwright*, 477 U.S. 168 (1984), the Court deferred to defense counsel's decision not to introduce mitigating evidence at a capital sentencing hearing where counsel had engaged in extensive pre-trial preparation, including obtaining a psychiatric report on the defendant with an eye toward mitigation, but for tactical reasons decided not to introduce that evidence at trial. *Id.*, 477 U.S. at 185-87. The Court concluded that the petitioner failed to overcome the strong presumption that the challenged action "might be considered sound trial strategy." *Id.*, at 186-87. Counsel's performance in Cone's case was far stronger in that mitigating evidence, through the testimony of a clinical psychologist and a neuropharmacologist, was actually presented during the guilt phase of trial. (J.A. 11-19) In *Darden*, the evidence was not presented at all. *Id.*, 477 U.S. at 184-86. Moreover, the Tennessee courts found that Cone's counsel made a "diligent and thorough investigation of the facts and the law." (Pet. App. 111)

Strickland itself involved a challenge to counsel's failure to present mitigation evidence at a capital sentencing hearing. *Strickland*, 466 U.S. at 675-76. In *Strickland*, the defendant pled guilty to three capital murder charges and chose to be sentenced by the trial judge without a jury recommendation. *Id.*, at 672. In preparation for the sentencing hearing, counsel spoke on the telephone with the defendant's wife and mother but did not meet with them

and did not otherwise seek out character witnesses, choosing instead to rely upon information that had come in at the plea colloquy. *Id.*, at 672-73. Again, this Court deferred to counsel's decision to forgo character evidence at sentencing in order to prevent the admission of additional harmful information. *Id.*, at 699. *See also Burger v. Kemp*, 483 U.S. 776, 794-95 (1987) (counsel's decision to present no mitigating evidence at sentencing not "outside the wide range of professionally competent assistance"). In view of *Strickland*, *Darden* and *Burger*, the state courts did not act unreasonably in concluding that counsel's decisions regarding the presentation of mitigating evidence were not constitutionally deficient.

In addition to finding no deficient performance in Cone's case, the state appellate court concluded that he failed to demonstrate prejudice. Under *Strickland*, this Court made clear that ineffective assistance claims premised upon a deficiency in attorney performance require that the defendant "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693; *Flores-Ortega*, 528 U.S. at 481. Although Cone complained in state court that defense counsel was ineffective for failing to introduce other relatives and associates to testify about his background, none of those individuals testified at the post-conviction hearing. Nor did Cone's mother offer any specific testimony concerning Cone's background; she complained only that no evidence was presented concerning "what kind of person Gary was." (J.A. 77) Thus, given the complete absence of proof concerning what, if any, mitigating evidence these witnesses might have offered had they been called to testify at Cone's sentencing, the state court, once again, reasonably concluded that Cone had failed to carry

his burden of proving prejudice flowing from these alleged deficiencies in his attorney's performance. (Pet. App. 109)

Without explanation, the Sixth Circuit disregarded the state court findings. Although it asserted that "counsel had plenty of mitigating evidence at his fingertips," the court utterly failed to identify what that evidence might have been.[4] And just as in *Strickland*, given the evidence concerning the circumstances of Cone's crime and his record of other violent criminal activity, the largely unspecified "background evidence" that trial counsel failed to present "would barely have altered the sentencing profile presented to the [jury]." *Strickland*, 466 U.S. at 700.

2. Waiver of Closing Argument

The other alleged deficiency in trial counsel's performance at sentencing was his decision to waive closing argument. Trial counsel testified at the post-conviction hearing that he made that decision based on a number of strategic considerations, primary among them to prevent a strong closing argument by the more experienced prosecutor. (J.A. 67-68) Testimony in state court from a local attorney confirmed the prosecutor's strong argument skills. (R. 4, Add. 2, Vol. III, p. 183) Moreover, as Cone's counsel pointed out, he had already made what was

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[4] Because the district court specifically found that Cone procedurally defaulted his claims based on counsel's alleged failure to investigate and develop proof in mitigation and denied an evidentiary hearing, the claims at issue were evaluated based on the evidence available to counsel at the time he made the decision. (Pet. App. 77)

essentially a closing argument in his opening statement at sentencing. (J.A. 68) Both the post-conviction judge and state appellate court refused to second-guess counsel's decision, stating:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance.

(Pet. App. 110)

Although the Sixth Circuit "reject[ed] out of hand" the Tennessee courts' conclusions, dismissing counsel's explanation for waiving closing argument as "totally unreasonable"(Pet. App. 35-36), it did so in direct contravention of the teachings of *Strickland*. Epitomizing the sort of hindsight judgment expressly condemned by *Strickland*, the court of appeals queried, "How much more devastating for the petitioner could the prosecutor's 'devastating' argument have been than the death sentence the petitioner got without such argument?" (Pet. App. 36) As *Strickland* made clear, however, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The state courts fully comprehended these admonitions and reasonably applied

them to conclude that counsel's decision to waive closing argument had been "a legitimate trial tactic." That conclusion can hardly be labeled unreasonable, particularly given the Sixth Amendment's "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

In adjudicating the merits of Cone's ineffective assistance claim, the Tennessee state courts found that defense counsel made a diligent and thorough investigation of the facts and the law, was conscientious in representing Cone, and placed much thought into the tactical aspects of the case. The state courts further found that counsel's diligence "could not remove the overwhelming evidence against the defendant, [and] the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel." (Pet. App. 111) Those conclusions are fully supported by the record and reflect a well-reasoned application of *Strickland* and its progeny.

By contrast, the Sixth Circuit's unauthorized *de novo* review of Cone's ineffective assistance claim was fatally hamstrung by its glaring lack of familiarity with the record. The opinion below inexplicably asserts that counsel remained "completely silent" during the sentencing phase (Pet. App. 31), that he "declined to address the court and jury" (*id.*), that he "presented no mitigating evidence at all" (*id.*), and "did not even ask the jury to spare his client's life." (Pet. App. 33-34) But the record shows that counsel made an opening statement at sentencing in which he informed the jury that he would rely on mitigating evidence presented during the guilt phase. He reiterated aspects of that evidence, argued in support

of both statutory and non-statutory mitigating circumstances, and clearly asked the jury for mercy on Cone's behalf. (J.A. 23-27) Counsel elicited information on cross-examination of a State's witness showing that Cone had been awarded a Bronze Star for his military service (J.A. 31), was successful in preventing the State from introducing highly prejudicial photographs of the two murder victims (J.A. 41-49), and made other objections during the course of the sentencing phase that were sustained by the trial judge. (J.A. 37, 38) The Sixth Circuit's scathing criticism of counsel's performance – that "Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of trial" (Pet. App. 36) – is based upon a scenario that, quite simply, did not occur.

II. THE COURT OF APPEALS IMPROPERLY PRESUMED PREJUDICE TO FIND A SIXTH AMENDMENT VIOLATION, WHERE CONE'S CLAIM OF INEFFECTIVE ASSISTANCE RESTED UPON SPECIFIC ERRORS BY COUNSEL AT TRIAL.

Strickland enunciated the standard for addressing Sixth Amendment claims based on "actual ineffective assistance" of counsel at trial, 466 U.S. at 683-84, establishing a two-part test for such claims. First, a defendant must show deficient performance by counsel and, second, that counsel's deficient performance prejudiced the defense. *Id.*, at 687. The Court acknowledged that the variety of circumstances faced by defense counsel and the range of legitimate decisions regarding how best to handle a given case foreclosed development of "detailed rules" or guidelines for representation. *Id.*, at 688-89. Rather, courts "must indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689. In addition, the Court emphasized that the purpose of the Sixth Amendment right to counsel is "to ensure that criminal defendants receive a fair trial." Thus, a defendant asserting a claim of ineffective counsel must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. *See also Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000).

On the same day the *Strickland* opinion was issued, this Court also decided another ineffective assistance case, which limited the circumstances under which a reviewing court may presume prejudice to find a Sixth Amendment violation. In *United States v. Cronic*, 466 U.S. 648 (1984), the defendant was charged in a complicated check-kiting scheme that had been under government investigation for over four years. When defense counsel withdrew, the trial court appointed a young real estate lawyer only 25 days before trial. *Id.*, 466 U.S. at 649. On appeal, the Tenth Circuit found it unnecessary to inquire into counsel's actual performance at trial or its possible impact on the outcome. Instead, it inferred that Cronic had been denied effective assistance based on five general criteria related to the circumstances of the case: (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel. *Id.*, at 652. This Court reversed, finding that a presumption of prejudice was appropriate only under circumstances that are "so likely to prejudice the accused that the cost of litigating their

effect in a particular case is unjustified," the most obvious being a complete denial of counsel. *Id.*, at 658. The Court instructed that "only when *surrounding circumstances* justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." *Id.*, at 662 (emphasis added). While acknowledging that the five factors identified by the court of appeals might be relevant to an evaluation of a lawyer's actual performance in a particular case, the Court concluded that Cronic's case was not one in which the surrounding circumstances made it unlikely that he could have received the effective assistance of counsel. *Id.*, at 665-66. Moreover, the Court noted that, should he later pursue claims based on "specified errors made by counsel," those claims should be evaluated under the standard enunciated in *Strickland*. *Id.*, at 666 n. 41.

This Court has recognized only three narrow circumstances in which prejudice may be presumed. First, prejudice may be presumed where there has been a complete denial of counsel. Second, a presumption is permitted when the state interferes with counsel's assistance. *Cronic*, 466 U.S. at 659 and n. 25. Both of those circumstances are easily identified and, "because the prosecution is directly responsible, easy for the government to prevent." Moreover, prejudice to the accused in such circumstances "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692 (citing *Cronic*, 466 U.S. at 658). Third, a more limited presumption of prejudice attaches "when counsel is burdened by an actual conflict of interest," provided that defendant

shows the conflict "adversely affected counsel's performance." *Smith v. Robbins*, 528 U.S. 259, 287 (2000) (quoting *Strickland*, 466 U.S. at 692); *see Cuyler v. Sullivan*, 466 U.S. 335, 350 (1980).

Aside from those circumstances, however, where a claim of ineffective counsel rests upon some articulable error by counsel in the course of representation, and where the "surrounding circumstances" do not prevent counsel's effective functioning, the *Strickland* analysis is fully competent to vindicate the accused's Sixth Amendment right to counsel. Bad lawyering, no matter how bad, does not justify invoking a *per se* presumption of prejudice under *Cronic*. As the First Circuit observed in *Scarpa v. Dubois*, 38 F.3d 1, 14 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995), once it becomes necessary to examine the trial record to evaluate counsel's particular errors, the *per se* presumption is no longer justified by *Cronic*'s rationale of avoiding the cost of case-by-case litigation. To apply *Cronic* in such situations would "do little more than replace case-by-case litigation over prejudice with case-by-case litigation over prejudice *per se*." *Scarpa*, 38 F.3d at 14.

In *Roe v. Flores-Ortega*, *supra*, this Court recently reiterated that, because the right to effective counsel is recognized, not for its own sake, but for its effect on the ability of the accused to receive a fair trial, "absent some effect of challenged conduct on the reliability of the . . . process, the [effective counsel] guarantee is not implicated." *Flores-Ortega*, 528 U.S. at 482 (citing *Cronic*, 466 U.S. at 658). The Court thus concluded that, "in cases involving mere 'attorney error,' we require the defendant to demonstrate that the errors 'actually had an adverse effect on

the defense.' " *Id.* *See also Smith v. Robbins*, 528 U.S. 259, 287 (2000) (listing the three categories of cases where prejudice is presumed as: (1) denial of counsel; (2) state interference; and (3) where counsel is burdened with an actual conflict of interest).

Since *Cronic*, this Court has consistently rejected attempts to presume prejudice when the defendant's ineffective assistance claim is premised on specific acts or omissions of counsel. In *Flores-Ortega*, the Court refused to presume prejudice where counsel failed to file a notice of appeal without defendant's consent. *Id.*, 528 U.S. at 484. In *Robbins*, the Court refused to presume prejudice where counsel neglected to file a merits brief on appeal. *Id.*, 528 U.S. at 288-89. In both cases, the Court required that the defendant demonstrate both the performance and prejudice prongs of *Strickland* to sustain an ineffective assistance of counsel claim.[5] Indeed, to require any less in such cases would substantially undermine the "strong presumption of reliability" normally afforded judicial proceedings. *Flores-Ortega*, 528 U.S. at 482 (citing *Robbins*, 528 U.S. at 286). By contrast, the Court refused to apply the *Strickland* test or the harmless error standard under *Chapman v. California*, 386 U.S. 18 (1967), where the denial of counsel left the defendant completely without representation on appeal. *Penson v. Ohio*, 488 U.S. 75, 88-89

[5] The Court noted in *Robbins* that such errors are "neither 'easy to identify' (since it is necessary to evaluate a defendant's case in order to find error) nor attributable to the prosecution," the policy reasons offered in *Strickland* for the first two categories in which a presumption of prejudice is permissible. *Robbins*, 528 U.S. at 287 n. 15 (citing *Strickland*, 466 at 692).

(1988). Thus, it is clear from *Strickland* and its progeny that, where claims of ineffective assistance rest upon specific acts or omissions of counsel in the course of representation, application of both prongs of the *Strickland* analysis is required.

Despite the clarity of this Court's directions, some lower courts have extended *Cronic* to cases involving claims of attorney "error" in trial proceedings. *See, e.g., Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998) (prejudice presumed where counsel failed to advocate "actively" his client's cause and expressed contempt toward client); *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991) (prejudice presumed where attorney failed to call any witnesses and conceded in closing argument that there was no reasonable doubt as to factual issues); *Osborne v. Shillinger*, 861 F.2d 612 (10th Cir. 1988) (prejudice presumed where counsel refused to pursue any non-statutory mitigating circumstances and argued client's actions were "atrocious"). *See also* Brief of Amici States. The court of appeals' decision in this case represents another impermissible extension of *Cronic*.

Here, the state post-conviction appellate court found that, "[a]lthough appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of [Cone's] defense." (Pet. App. 111) Counsel's opening statement at trial outlined a clear theory of defense, which was reiterated throughout the trial proceedings – that Cone was damaged psychologically and physically (in the form of drug addiction) as a result of service to his

country in Vietnam, and that his actions in this case were directly attributable to that damage. (R. 4, Add. 1, Vol. X, pp. 551-53; J.A. 19-20) Counsel called lay and expert witnesses to support that theory during the guilt phase and actively cross-examined the State's witnesses in both the guilt and sentencing phases of trial. The Tennessee Supreme Court's opinion on direct appeal from Cone's conviction and sentence outlined significant aspects of Cone's proof presented in the guilt phase, including testimony of two expert witnesses, Drs. Jaremko and Lipman, as well as pertinent information about Cone's background. (Pet. App. 89-91) What is more, at the beginning of the sentencing phase, defense counsel carefully explained to the jury that the defense relied on mitigation proof presented during the guilt phase, as he was entitled to do under Tenn. Code Ann. §39-2-203(e) (1982)[6]; he argued in support of a number of statutory and non-statutory mitigating circumstances; and he asked the jury for mercy on behalf of his client. (J.A. 23-27)

Cone was not without counsel during the sentencing phase, nor was his lawyer precluded from rendering effective assistance by some extra-judicial structural impediment – "surrounding circumstances" – that might justify application of the *Cronic* presumption because their impact on the outcome of the trial was not capable

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[6] Tenn. Code Ann. §39-2-203(e) (1982) provides, in pertinent part: "After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both."

of accurate measurement. Rather, the quality and effect of the lawyering afforded Cone was fully capable of assessment under *Strickland*. The Tennessee courts found that Cone received constitutionally effective assistance of counsel under that standard (Pet. App. 108-11) – a decision that the district court correctly recognized was neither contrary to, nor involving an unreasonable application of, clearly established federal law. (Pet. App. 77-81)

Despite the absence of proof of prejudice in the state post-conviction proceedings and an express finding by the state appellate court that no prejudice had occurred (Pet. App. 111), the court of appeals turned to *Cronic*, concluding that counsel failed to subject the prosecutor's insistence on the death penalty to "meaningful adversarial testing." (Pet. App. 37) The court's presumption of prejudice in this case obfuscates the entire rationale of *Cronic* and ignores the dictates of *Strickland*. To affirm the application of *Cronic* under these circumstances would essentially erect *per se* rules that counsel in capital cases must always present mitigation evidence, a result directly contrary to *Strickland*, *Darden* and *Burger*, *supra* pp. 29-30, and that counsel must always present closing argument at sentencing, a result incompatible with this Court's oft-repeated insistence that attorney performance be assessed on a circumstance-specific basis. *Flores-Ortega*, 528 U.S. at 478; *Strickland*, 466 U.S. at 688.

In *Engle v. Isaac*, 456 U.S. 107, 128 (1982), this Court observed that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish

offenders and their good-faith attempts to honor constitutional rights." The court of appeals' unnecessarily expansive reading of *Cronic* in this case not only ignores the dictates of *Strickland*, but frustrates the substantial interests of comity, federalism and finality of judgments, a result Congress specifically sought to prevent through the enactment of AEDPA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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